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Supreme Court of the United States

OCTOBER TERM, 1942

No. 304

[redacted]

Appeal from the Supreme Court of the State of Michigan

[redacted]

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Supreme Court of the United States

OCTOBER TERM, 1947

No. 374

BOB-LO EXCURSION COMPANY,
Defendant and Appellant,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff and Appellee.

Appeal from the Supreme Court of the State of Michigan

BRIEF FOR BOB-LO EXCURSION COMPANY

OPINION BELOW

The opinion of the Supreme Court of Michigan (R. 36) is reported in 317 Michigan 686. There was also a written opinion in the Recorder's Court (that being the trial court and court of first instance) denying defendant's motions for verdict and judgment which is part of the record herein 15-35.

JURISDICTION

The statement of Bob-Lo Excursion Company, appellant, setting forth the basis on which the review of the judgment of the Supreme Court of Michigan is here invoked on appeal has been heretofore filed with this Court in this cause in compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, and probable jurisdiction has been noted by the Court on October 27, 1947 (R. 59).

STATEMENT OF THE CASE

This is a test case and the facts are undisputed. In the summer of 1945, appellant, defendant herein, refused to carry a colored girl, and because she was colored, upon one of its vessels from its dock at Detroit, Michigan, to Bois Blanc Island, locally and hereinafter referred to as Bob-Lo Island, Ontario, Canada (R. 6). It tendered to her in repayment the price of the ticket in accordance with its terms which she refused (R. 4, 5). For its action in refusing her passage defendant was prosecuted, convicted and sentenced under the Michigan "Civil Rights" Act (pages 5-6 hereof). The unconstitutionality of the Michigan statute involved under the commerce clause of the federal Constitution was raised in the trial court by way of motions for verdict of not guilty and of judgment of not guilty (R. 12, 14, 15) upon the same grounds as this appeal, which motions were denied (R. 35). The same questions were again raised upon the appeal to the Supreme Court of Michigan (R. 35). The defendant is organized as a private corporation for profit, to engage in the business of leasing, owning and operating "amusement parks in Canada, and to Charter, lease, own and operate excursion

steamers and ferry boats in interstate and foreign commerce, together with dock and terminal facilities pertaining thereto'' etc., (R. 5) and its principal business consisted, as set forth in the opinion of the Supreme Court of Michigan (R. 37, 38), in the transportation of passengers from Detroit upon the Detroit River "to and from Bob-Lo Island (also known as Bois Blanc) and the operation of facilities for recreation and amusement owned by it on Bob-Lo Island. Except for four lots this Island is owned by defendant. It is a part of the Province of Ontario, Dominion of Canada. Only defendant's ships have access to Bob-Lo Island. Ordinarily these ships make round trips between Detroit and the Island, but occasionally they also make round trips between Windsor, Ontario, and Bob-Lo Island. But defendant does not transport passengers from Canada to Michigan," (except those they have carried there). "In traveling between Detroit and the Island defendant's ships cross the international boundary line several times and are in Canadian waters for about a half of the voyage. Defendant's ships are required by federal law to be enrolled by the United States Customs Service, and the enrollment license must be renewed annually. Defendant's commerce activities and ships are subject to regulations and inspection by the United States Treasury, the United States Immigration Service, the United States Navy Department and the United States Army Engineers. Its ships are also regulated by similar governmental agencies of the Dominion of Canada." Defendant only uses its own property and does not use any public property in Detroit or Bob-Lo Island (R. 6, 11, 12). It caters largely to women, children and churches (R. 6). Its transportation rates are not regulated by any public authority and it makes such rates as it sees fit (R. 7) and they vary as to individuals, days of the week, and discounts offered, and each year it gives

away several thousand passes (R. 7). Defendant's vessels only carry passengers and do not carry mail, freight or express and defendant has no joint or through traffic rate with any railroad, steamship company, motor vehicle company, corporation or partnership (R. 7). At arrival of the vessels at Bob-Lo passengers who land must pass Canadian customs and immigration inspection (R. 8, 9) and upon returning to Detroit, United States customs and immigration examination (R. 8, 9). The vessels are annually inspected by federal steamboat inspectors who issue permits to operate (R. 8, 9) and a somewhat similar license from the Dominion Government is required (R. 9). Defendant is required to make periodic customs reports to the United States Treasury, immigration reports to the Department of Justice, other reports to the United States Navy Department, to the United States Army Engineers, and the Department of National Health and Welfare of the Dominion Government (R. 8, 9). Customs clearances are required both by the United States and Canada (R. 8, 9).

SPECIFICATION OR ERRORS TO BE URGED

The questions here presented to the Court are in reality but one, viz: the Michigan Civil Rights Statute is either unconstitutional as violating the commerce clause of the Federal Constitution, or at least may not constitutionally be applied to defendant when engaged in its foreign commerce business. The two assignments of error (R. 52) providing the above in detail and here urged are as follows:

1. The Supreme Court of the State of Michigan erred in its decision and judgment in holding the Michigan "Civil Rights" Act as amended, (Act 117, P. A. 1937; sec. 17115-146, 7 Mason's 1940 Cumulative Supplement; Stat. Ann. 1946 Cum. Supp. Sec. 28.343,4) was valid and

in holding the same was applicable to defendant when engaged in foreign commerce, on account of the provisions of Art. I, Sec. 8, (3) of the Constitution of the United States, under which the said Michigan "Civil Rights" Act is either unconstitutional or at least may not be constitutionally be applied to defendant when engaged in such foreign commerce, and which decision is hereby assigned as error.

2. The Supreme Court of the State of Michigan erred in its decision and judgment in holding that the aforesaid Michigan "Civil Rights" Act as amended was valid and enforcible as against this defendant when engaged in foreign commerce, in that under Article I, Sec. 8 (3) of the Constitution of the United States, such foreign commerce may not be regulated by the State of Michigan but is solely under the jurisdiction of the Congress of the United States, and the said Supreme Court of Michigan erred in not holding said Act may not constitutionally be applied to defendant when engaged in foreign commerce, or in not holding said act was invalid under said provision of the Constitution of the United States if so applied, and which decision is hereby assigned as error.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Constitution Article I, Sec. 8, (3) reading as follows: "Section 8. The Congress shall have Power * * * (3) To regulate Commerce with foreign Nations, and among the several States." * * *

The Michigan Statute attacked herein as a void or at least inapplicable regulation of foreign commerce as applied to defendant's business is the Michigan Civil Rights Statute and being Mich. Stat. Ann. 1946 Cum. Supp. Sec.

28.343,4 (also known as Sec. 17115-146-7 Michigan Compiled Laws 1940)—

> "All persons within the jurisdiction of this state shall be entitled to full and equal accommodations, advantages, facilities and privileges of inns, hotels, restaurants, eating houses, barbershops, billiard parlors, stores, public conveyances on land and water, theatres, motion picture houses, public educational institutions, in elevators, on escalators, in all methods of air transportation and all other places of public accommodation, amusement, and recreation, where refreshments are or may hereafter be served, subject only to the conditions and limitations established by law and applicable alike to all citizens and to all citizens alike, with uniform prices."

Section 147 provides for punishment by way of fine or imprisonment or both and then enacts that any person who violates any of its provisions "shall be liable to the injured party, in treble damages sustained, to be recovered in a civil action."

ARGUMENT

SUMMARY

(a) Defendant is engaged in foreign commerce.

(b) The Michigan Civil Rights Statute involved may not constitutionally be applied to defendant when engaged in such foreign commerce on account of the commerce clause of the Federal Constitution.

(c) Comment upon opinion below.

DETAILED ARGUMENT

(a) Defendant is engaged in foreign commerce:

As stated in the foregoing statement of facts defendant's business was the ownership and operation of two steamers plying from Detroit U. S. A. to Bob-Lo Island Canada, and the transportation of passengers thereon. Its passengers from Detroit are transported by defendant on its vessels to Bob-Lo Canada, where they disembark, later returning to Detroit by the same or another of defendant's vessels. On the route to the island the international boundary between the United States and Canada is crossed four or five times and a like number of times on the voyage from Bob-Lo, Canada to Detroit, U. S. A. Approximately half the voyage is in Canadian waters and one-half in American waters (R. 8). Bob-Lo Island is in Canadian waters and a part of the province of Ontario, Dominion of Canada. Defendant's passengers are subject at each termini to both United States and Canadian Customs examination, immigration inspection and the like.

That the above transportation from Detroit U. S. A., to Bob-Lo, Canada, is foreign commerce cannot be doubted, and the Supreme Court of Michigan so held herein (R. 39). Were it not for the strenuous efforts made by coun-

sel below in claiming it was not foreign commerce, counsel for appellant would feel it unnecessary to cite authorities for such a self-evident proposition.

In *Lord v. Goodall S. S. Co.*, 102 U. S. 541, a coastal vessel going without the three mile line was held *merely by that act to be engaged in commerce.* There the craft was plying between two ports both in California and the court stated—

> "She was not trading with them" (other nations) "but she was navigating with them, and consequently with them was engaged in commerce" (544).

In the case at bar defendant's vessels on each voyage not only "navigate with" Canadian and other vessels on the Detroit River but go *outside* the state's boundary (corresponding with the three mile limit in the Lord case) and in addition actually proceed over and upon Canadian waters, and docks and ties up at Bob-Lo a Canadian port in and on Canadian soil, and discharges and takes on passengers thereat. Said the court in the Lord case, *supra,* on page 544—

> "*Commerce includes intercourse, navigation, and not traffic alone*" (emphasis supplied). The vessel when beyond the three mile zone was on "navigation which was necessarily connected with other nations." While there only her national character was recognized, she belonged "to the country whose flag she carried. True she was not trading with them, but she was navigating with them, and consequently with them was engaged in commerce." If she committed a wrong, the United States, and not California must answer. "Such nagivation * * *" (affects) "the nation as a nation in its external affairs. It must, therefore, be subject to the national government."

Under the facts in the case at bar this statement is even more true, because defendant's vessels dock at a foreign port and actually traverse foreign waters.

Again, in *Hanley v. Kansas City So. Ry. Co.*, 187 U. S. 617, this Court unqualifiedly held that "*transportation for others as an independent business is commerce*" and "to bring the transportation within the control of the state, as part of its domestic commerce, the subject transported must be within the *entire* voyage under the exclusive jurisdiction of the state." (Emphasis supplied.) There a railroad carried goods between two points in Arkansas, part of the route being in Indian Territory (now Oklahoma). The Court held the entire transportation was in interstate commerce, and that Arkansas could not regulate it, pointing out that if that state could regulate it, so could the other state, thus opening the door to *possible* contradictory regulations. For it to be intrastate commerce and part of the state's domestic commerce so the state may regulate it, "*the subject transported must be within the entire voyage under the exclusive jurisdiction of the State,*" quoting with approval from *Pacific Coast Steamship Co. v. Railroad Commr's.*, 9 Sawyer 253, 8.

Further showing that no trading is necessary *the only requisite being transportation over a state line*, is the case of *Edwards v. California*, 314 U. S. 160. There California had passed legislation to protect herself from indigent persons who wished to enter that state to *reside*, and who might well later become public charges. The court found the statute was an unconstitutional effort of the state to regulate interstate commerce, and an "okie" attempting to enter California from another state *to reside*, was held to be in interstate commerce simply because the state line was crossed. No business or trading was involved—only transportation over a state line.

In all the above cases the sole test is "Is there transportation across a state line?" The motives of persons being transported are immaterial. Defendant's business

(and that for which it is oragnized as a private profit corporation) is to transport persons between United States of America and Canada (R. 5).

In *Hall v. DeCuir*, 95 U. S. 485, 489 the court found interstate commerce was involved on a voyage between two points each in Louisiana where the vessel during part of the voyage traversed waters of the Mississippi river lying within that state. As is well known the foundation for this rule was laid down in the celebrated case of *Gibbons v. Ogden*, 9 Wheaton 1.

It is submitted the above cases conclusively demonstrate that defendant, in carrying on its business of transporting passengers from Detroit U. S. A. to Bob-Lo, Canada, crossing the international boundary several times on each voyage and being in Canadian waters and docking and discharging passengers from Detroit at Bob-Lo, Canada, and returning to Detroit and again discharging passengers is engaged in foreign commerce.

(b) The Michigan Civil Rights Statute may not constitutionally be applied to defendant when engaged in the above foreign commerce on account of the provisions of the commerce clause of the federal constitution.

The Michigan act involved is set forth herein on page (6). It is in part a criminal statute (and therefore as to such portion is to be strictly construed in favor of defendant) and provides in effect that "equal accommodations," facilities, etc., shall be furnished by amongst others "public conveyances on land and water," and that no discrimination shall be shown by such conveyance on account of race, creed or color. Penalties for violation are provided. Also treble damages may be recovered in a civil suit by a party aggrieved.

This case has in effect already been decided by this court in *Hall v. DeCuir*, 95 U. S. 485. The facts there were practically identical to those in the case at bar, and the case has uniformly been followed many, many times by this court over the period of some seventy years since its decision. There it appeared that a statute of Louisiana was for all practical purposes identical with the Michigan statute here involved. Said Mr. Chief Justice Waite on page 487 in opening his opinion:

> "For the purposes of this case, we must treat the act of Louisiana, of February 23, 1869, as requiring those engaged in interstate commerce to give to all persons traveling in that State, upon the public conveyances employed in such business, *equal rights and privileges* in all parts of the conveyance, without distinction or discrimination on account of race or color. Such was the construction given to that act in the courts below" which is conclusive on us. (Emphasis supplied.)

There defendant's vessel plied on the Mississippi River from New Orleans, Louisiana, to a point in the state of Mississippi (two states). In the case at bar the vessel plied on the Detroit River from Michigan to a point in Canada (two countries). There a colored person sought to take passage between two points each in Louisiana (the vessel however touching during such voyage at an intermediate landing in Mississippi), she was refused transportation and the action followed. Here a colored person was refused such passage between Michigan and Ontario, Canada. The Supreme Court of the United States found the Louisiana statute to be void as an unconstitutional regulation by the State of Louisiana of interstate commerce. The State Supreme Court had construed the Louisiana statute as being applicable to vessels engaged in interstate (foreign) commerce (as did the Michigan

Court herein), and upon appeal, the federal Supreme Court found the statute void as an unconstitutional state regulation of interstate commerce.

In its opinion in the DeCuir case the Supreme Court found that interstate commerce was involved (although the passage was between two points in Louisiana) since waters of the Mississippi river lying in that state were also travelled upon, and proceeded to hold that the Commerce Clause gives to Congress the *exclusive* right to regulate interstate commerce. The court observed that although under its police power the state may pass health and inspection laws and pilotage acts, here the statute in question went beyond that point and—

> "does encroach upon the exclusive power of Congress," for it acts "directly upon the business as it comes into the State from without or goes out from within." It influences the management of the business of the carrier, and goes without the police power. Continuing the court remarked—"It was to meet just such a case that the commercial clause in the Constitution was adopted. The River Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay more, it could prescribe rules by which, the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to obse ve one set of rules, and on the

other another. Commerce cannot flourish in the midst of such embarrassments. * * * Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammeled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be. If this statute can be enforced against those engaged in interstate commerce, it may be as well against those engaged in foreign; and the master of a ship clearing from New Orleans for Liverpool, having passengers on board, would be compelled to carry all, white and colored, in the same cabin during his passage down the river, or be subject to an action for damages, 'exemplary as well as actual,' by any one who felt himself aggrieved because he had been excluded on account of his color.

"This power of regulation may be exercised without legislation as well as with it. By refraining from action, Congress in effect, adopts as its own regulations those which the common law or the civil law, where that prevails, has provided for the government of such business, and those which the States, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution. In fact, congressional legislation is only necessary to cure defects in existing laws, as they are discovered, and to adapt such laws of new developments of trade. As was said by Mr. Justice Field, speaking for the court in *Welton v. The State of Missouri*, 91 U. S. 282, '*inaction* (by Congress) * * * *is equivalent to a declaration that inter-state commerce shall remain free and untrammelled.*'" (Emphasis supplied.)

The Mississippi River as the court stated passes "through or along the borders of ten different States" and "the commerce upon these waters is immense, and

its regulation clearly a matter of national concern." In the case at bar the traffic is upon the Detroit River (through which it is commonly remarked passes more traffic than any other body of water in the world), which forms a part of the Great Lakes waterway whose directly connecting waters touch upon Minnesota, Wisconsin, Michigan, Illinois, Indiana, Ohio, Pennsylvania, New York (eight states) and Canada, a foreign Country, (including two provinces of that foreign country, i.e., Ontario and Quebec). As was said in the DeCuir opinion "if the public good requires such legislation" on the Mississippi river, it is equally true upon the connecting waters of the Great Lakes, and such regulation "must come from Congress, and not from the States." It is respectfully submitted the DeCuir case is decisive and controlling herein.

The case of *Hall v. DeCuir, supra*, has been consistently followed by the Supreme Court of the United States for seventy years, the last of such occasions being in June, 1946, where a Virginia statute requiring that contiguous seats on interstate buses should not be occupied at the same time by persons of different races was held to be invalid under the commerce clause as burdening interstate commerce, *Morgan v. Virginia*, 328 U. S. 373. There Virginia had adopted a statute requiring common carrier passenger motor vehicles (both interstate and intrastate) to segregate white and colored passengers. The segregation provision was exceedingly mild, simply providing that contiguous seats be not occupied by persons of different races at the same time. A colored passenger refusing to so sit in the bus was fined for violation of the statute. The Supreme Court of Appeals of Virginia sustained the statute under the police power on the theory that, Congress not having acted, the State could act since the subject did not require uniformity of treatment. Upon appeal

to the United States Supreme Court, the statute, in an opinion by Mr. Justice Reed was found invalid as an unconstitutional exercise by the State of powers possessed by the Congress alone, i.e., the commerce power. The Court in its opinion again relied principally upon the DeCuir decision quoting at length from it, as did the concurring majority opinions. For example, at the beginning of Mr. Justice Frankfurter's opinion it is stated "But for me *Hall v. DeCuir,* 95 U. S. 485, is controlling. Since it was decided nearly seventy years ago, that case on several occasions has been approvingly cited and has never been questioned. Chiefly for this reason I concur in the opinion of the Court." There was but one dissenting voice in the Morgan case, that of Mr. Justice Burton. His opinion indicates that under the court's judgment all such state regulation of racial transportation matters is eliminated, and in the absence of federal legislation thereon such matters are unregulated, and left to the respective carriers (page 391). Upon principle the Morgan case and the case at bar cannot be distinguished and the wording of the Court's opinion is equally applicable to the Michigan Statute. The Michigan Statute does not require segregation but does *require* the public conveyance to furnish equal accommodations and privileges to all persons, and therefore is just as much of a regulation of interstate (foreign) commerce as was the Virginia Statute which has so recently been stricken down.

It is conceded Congress has not acted to regulate as to carriage of colored in interstate or foreign commerce of either passenger carriers by motor (Morgan case) or passenger water carriers such as defendant who do not maintain a joint through rate with a railroad or other carrier etc. (The very basis of appellee's claim to support the conviction of appellant is that because Congress has not

acted to legislate as to racial transportation of this defendant in its foreign commerce that the state may. If there were such racial *federal* legislation respecting this defendant in its business, then its conviction under the Michigan statute would be erroneous, the very ground which the State uses in its attempt to support the statute being cut away.) Since its decision in the Morgan case less than two years ago this Court has on four different occasions cited it as the most recent authority for the proposition that under the commerce clause state action is limited even though there be (as in the case before us) no Congressional action. *Joseph v. Carter & Weeks Stevedoring Co.*, 91 L. Ed. 720; *Fay v. People of the State of New York*, 91 L. Ed., 1517; *Richfield Oil Corporation v. State Board of Equalization*, 91 L. Ed. 123, and *Freeman v. Hewit*, 91 L. Ed. 205, where Mr. Justice Frankfurter on page 207 wrote "in two recent cases" (of which the Morgan case *supra* was one) "we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. *In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.*"

The Michigan statute and the stricken Louisiana statute (in the DeCuir case) provided for equal accommodations and privileges, (DeCuir case pp. 487). The Louisiana statute was voided in the DeCuir case as placing a burden by the state upon interstate commerce. So with defendant here. This defendant considers that for the profitable operation of its business it should exclude colored persons and certain others (R. 10, 11, 21). If the statute is upheld as to this defendant in its foreign commerce then a real burden will be placed upon it, not only that of a forced

change in established policy (R. 21) which from its experience it believes inadvisable, (and which amounts to substituting the judgment of the state for its own judgment in the management of its business), but one which for defendant's economic welfare as a result of the statute, might compel it to change the deck structure of its vessels at great expense, so as to segregate but still provide equal accommodations. Those are each real burdens. The DeCuir opinion points out others. In the Morgan case, *supra*, where the statute was stricken as an unconstitutional burden by the state on interstate commerce, the only burden was mild indeed, as there all the carrier would have had to do to comply with the statute would be to re-seat its passengers (if even that became necessary) upon crossing the Virginia line. In the case before us Ontario or Canada might pass a colored exclusion act as to vessels, or might pass an act providing for not equal but rather identical or mixed accommodations, which while in Ontario or Canadian waters this defendant would have to observe. Clearly it could not do so if while in Michigan waters it would have to observe the Michigan requirement. This is the possible identical confusion, lack of uniformity and consequent burden pointed out in the DeCuir case, (Note: All that is required is *possible* confusion, lack of uniformity etc.—there does not have to be *actual* confusion, lack of uniformity etc., for in the DeCuir case Louisiana had legislated and Mississippi had not, but there was the mere *possibility* that it might do so:) and also in this Court's principal opinion in the recent case of *Morgan v. Virginia, supra*, where is shown (pp. 382) the diversity of, *and lack of*, state legislation applying to racial transportation. In the case at bar, Canada and Ontario may be added to that list.

Another case with nearly identical facts is that of *Pryce v. Swedish American Lines*, 30 Fed. Supp. 371.

There plaintiff brought suit alleging in the second count discrimination because of color on a cruise from New York to South America (foreign commerce) bringing the action on this count under a New York statute prohibiting discrimination by a common carrier because of color. The statute was similar to Michigan's. (The Michigan statute is believed to have been drawn from the New York statute, *vide Cahill's N. Y. Consol. Laws* Ch. 41, Sec. 514). Upon motion to dismiss the count, the court held that the statute could not be construed to forbid discrimination between passengers by a common carrier engaged in foreign commerce, i.e., between New York and foreign countries, because if so construed "the statute undoubtedly would illegally interfere with foreign commerce" (page 372). The count was therefore dismissed, it being held the statute could not be sustained under the police power.

As illustrating the complex foreign nature of defendant's foreign business, the amount of federal regulation and the practical as well as legal impossibility of Michigan control, attention is called to the fact as set forth in the Statement of Facts herein, that its vessels, in order to proceed from Detroit U. S. A. to Bob-Lo, Canada, are required to have licenses to operate issued both by the Federal Government and by the Dominion Government. The vessels operate under enrollment issued by the United States, they are required to report and clear to the federal government, and are otherwise regulated by it, and are regulated by Canada as well (R. 8, 9). Canada (or a province as the case may be) may specify whom and how, and under what conditions defendant may transport when upon its waters, to say nothing of discharging passengers on its own soil of Bob-Lo. If Canada desires, it may by law exclude colored from its waters, or from its soil of BobLo. Michigan is powerless therein. The federal government alone could protest or act. As was said in *Glou-*

cester Ferry Company v. Pennsylvania, 114 U. S. 196, "otherwise there would be no protection against conflicting regulations of different states" (in our case Canada).

The fifth syllabus of *Wabash etc. Ry. v. Illinois*, 118 U. S. 557,8, reads—

> "A statute of a state, *intended to regulate* or to tax or to impose any other restrictions upon the *transmission of persons* or property or telegraphic messages from one State to another, is *not* within that class of legislation which the States may enact *in the absence of legislation by Congress;* and that such statutes are void *even as to that part of such transmission which may be within the state.*" (Emphasis supplied.)

Likewise in *Henderson et al. v. Mayor of New York*, 92 U. S. 259 it was held that local regulations of commercial matters which are not only national in character—*but international* (as in the case before us), must be governed by uniform rules, and that such may only be made by the Congress. See also *Board of Trustees v. U. S. A.*, 289 U. S. 48; and *Rhodes v. Iowa*, 170 U. S. 412.

Defendant might cite countless cases from this court upon the general subject, upon the general rule that states may not burden interstate or foreign commerce, upon the general rule of the police power of the states, etc., but counsel believes the same would only unduly lengthen this brief and unnecessarily so because this court has spoken in the precisely similar case of *Hall v. DeCuir, supra*, and also in the case of *Morgan v. Virginia, supra*. It is respectfully submitted that those decisions should be decisive herein.

As in most constitutional questions defendant has relied upon questions of powers, constructions and other legal, technical if you will, grounds, e.g., defendant is engaged

in foreign commerce and the DeCuir decision is controlling therein, as well as *Morgan v. Virginia. But there is something broader involved herein.* This Michigan legislation when attempted to be applied by that State to a business such as that carried on by defendant is *not* a regulation of *intrastate* business incidentally affecting interstate business. It is not even as if Michigan were attempting to regulate the intrastate portion of an interstate or foreign trip; *for in the case before us there is no intrastate portion,* the vessels proceed directly from Detroit to Bob-Lo, Canada without stopping at another point in Michigan. If there was an intrastate portion of the voyage we might concede for purpose of the argument that Michigan might conceivably regulate it, but there is none. In defendant's business it cannot take passengers on its vessels without transporting them to Canada. The effect of permitting the Michigan statute to apply to this defendant in its particular business is to give Michigan authority to legislate and regulate defendant's activity in another and completely foreign jurisdiction. The Michigan statute if it is to be validly applied herein compels defendant to transport persons to Canada. Any such extra-territorial effect of legislation is invalid, *vide* last paragraph of this court's opinion in *Morgan v. Virginia, supra* (page 386).

(c) Comment upon opinion below.

The argument above covers all but three portions of the reasoning of the opinion of the Supreme Court of Michigan which is reviewable herein. Those portions will now be discussed.

(1) The opinion of the Supreme Court of Michigan admits the DeCuir case is controlling but attempts to distinguish it from the case at bar by drawing so fine a line

that it fades into nothingness. There the Michigan Court in discussing the DeCuir case observed that therein "The court based decision upon the assumption that by reason of traversing the waters of various states and stopping at ports in such states" (R. 40) (two states only) "the carrier might meet with statutory requirements of various types, and with which the Louisiana statute might be in conflict and compliance with both would be quite impossible." So too in the case before us, the vessel stops at ports in two countries, and defendant herein is confronted with a similar statute, an identical burden, and the identical *possibility* of Ontario and/or Canadian contrary regulation which existed from the State of Mississippi in the DeCuir case, but to a much greater extent here because Ontario or Canada may lawfully regulate traffic on her waters and her island, while therein Mississippi could not constitutionally do so. Again how may it be said in the absence of gazing into a crystal globe as was stated in the opinion of the Supreme Court of Michigan that this "defendant in carrying on its commerce or transportation will not be subjected to an undue burden arising from conflicting regulations" (R. 41)? *Canada may act, it has the right.* Louisiana had its statute like Michigan, Mississippi had passed no contradictory regulation, the mere *possibility* that Mississippi *might* do so was the causation leading to the invalidation of the Louisiana statute. So likewise here, the province of Ontario or the Dominion of Canada may, indeed *have the right* (which Mississippi did not have constitutionally) to make valid regulations in utter conflict with Michigan's statute. From the very nature of things the matter of commerce between two countries becomes national and beyond the scope of the state. The Michigan opinion indicates a greater burden existed on interstate commerce in DeCuir then in the case before us but refrained from pointing out

what it was. It is respectfully submitted there was no greater burden, for the Louisiana and Michigan statutes are practically identical; in DeCuir the vessel's total run was only between two states, and in the case at bar between one country and another.

(2) The opinion below quotes from *Mitchell v. U. S.*, 313 U. S. 80 (R. 42), anent the Interstate Commerce Act (U. S. C. A. Title 49, Sec. 1, par. 3). Believing the Supreme Court of Michigan must have supposed that act applied to all common carriers, as its opinion states (R. 42), we call this court's attention to the fact the statute there involved applied only to interstate common carrier railroads and interstate water common carriers who maintain a joint through rate with a railroad, etc., U. S. C. A. Title 49, Sec. 1, (which defendant does not). Defendant is not in this category; if it were the Congressional Act would as shown above (pages 15-16) have superseded this State legislation and there could be no conviction under the latter. Congress has not passed any such color regulation for (a) interstate water passenger carriers such as defendant nor (b) for interstate passenger motor carriers. For such water and motor carriers the Supreme Court of the United States has held (in the DeCuir case for vessels and in the Morgan case for motor vehicles) that lack of such regulation by Congress is a declaration that they be kept free of such state regulation, and consequently any such attempted state regulation is invalid. See also *Freeman v. Hewit, supra.*

A reason of the Michigan Supreme Court for its opinion is that the Michigan statute is "indicative of the character of federal regulations in this field of law" (R. 42). However, as pointed out by Mr. Justice Reed in the Morgan case, "there is no federal act dealing with the separation of races" for interstate motor passenger carriers, nor is

there a federal act dealing with separation of races by water carriers such as defendant.

(3) The Michigan opinion states (R. 41) the Michigan statute "is in accord with the federal civil rights act." The two statutes are most dissimilar as to the matters sought to be regulated, the Federal Act covering *political* rights, and the Michigan Act covering civil matters, not political. Counsel has been unable to locate any Congressional Civil Rights Act (covering civil matters) applying even to that Congressional ward, the District of Columbia. On the contrary there is an act applying to the District which assumes segregation of the races in attendance at public schools, (District Columbia Code Title 31, Sections 1109-1113). The policy of the Congress therefore would seem to be plainly otherwise than as indicated by the opinion below.* As stated in (2) above Congress has deliberately excluded interstate and foreign water passenger carriers such as defendant (even assuming defendant is a common carrier which the Court below did not find (R. 43)), and interstate common carriers of passengers by motor, from the color legislation it has passed for practically all other types of common carrier, such as railroads, certain water common carriers who operate in connection with a railroad, etc., etc., thus indicating that as to them Congress in effect declares they should not be so regulated.

The familiar maxim *expressio unis est exclusio alterius* could find no better exemplification than in the case under consideration. Congress has acted to prevent segregation of the races by common carrier interstate railroads,

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*See "The Report of the President's Committee on Civil Rights" p. 63; pp. 87-95 (1947). Segregation in the District seems to be ill not legislated for, at least approved by additional Congressional action such as Organic Acts of 1873 and 1906 and other local legislation for the District.

(U. S. C. A. Title 49, Sec. 1, and Sec. 3, para. 1; *Mitchell v. U. S.*, 313 U. S. 80), and by common carrier interstate or foreign passenger water carriers if they maintain a joint through rate with another etc. (U. S. C. A. Title 49, Sec. 1). Congress of course has the right in its wisdom to legislate as to racial matters for passenger water carriers engaged in interstate or foreign commerce such as defendant. (As remarked above (pp. 15-16) if Congress had so legislated, the Michigan statute would admittedly be void or at least inapplicable to defendant). But Congress has not so legislated for those water carriers such as defendant, nor has Congress so legislated for interstate passenger motor carriers. Congress by its color legislation covering railroads and water carriers who maintain a joint through rate etc., has acted, and by its action shown its intent to allow passenger water carriers like defendant (for whom there is no federal legislation respecting carriage of colored), and motor carriers of passengers, to segregate or draw such color line as the management shall determine. In this respect the position of defendant is stronger than if Congress had not so acted as to any carrier, for then there might at least be an argument made that Congress not having acted at all was leaving the entire field to the states.

CONCLUSION

It is respectfully submitted the judgment of the Supreme Court of the State of Michigan should be reversed.

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